PENGKALEN SECURITIES SDN BHD

v.

LEOW LI LAIN

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[ORIGINATING SUMMONS NO: D5-24-70-1996]
12 DECEMBER 1996

CIVIL PROCEDURE: *Injunction - Injunction to restrain winding-up petition - Petition not yet presented - Whether application premature - Test to be applied*

CIVIL PROCEDURE: *Mode of commencement - Action under Companies Act 1965 - Recovery of debt from company - Debt in dispute - Whether statutory notice correct mode - Whether claim should be made by way of writ*

CIVIL PROCEDURE: *Costs - Anticipatory application - Overtly cautious plaintiff - Whether should be made to bear own costs*

The plaintiff had employed the defendant as a remisier from 2 March 1992 to 31 December 1994. The dispute between the parties arose in relation to the percentage of commission payable to the defendant and the commissions which were offset against the contra losses suffered by the defendant's clients. The defendant sent a statutory notice of demand under s. 218 of the Companies Act 1965 ('the Act') for the sum of RM314,348.95, which in effect meant that failure to comply with the notice would result in winding-up proceedings being instituted against the plaintiff. The claim was disputed by the plaintiff. In the course of correspondence, the defendant twice suspended the time under the notice by seven days. The plaintiff then gave the defendant a deadline to confirm in writing that she would not be filing a winding-up petition. The deadline having passed, the plaintiff applied to court for an injunction to restrain the defendant from presenting a winding-up petition. The plaintiff submitted that the defendant would be adequately compensated by damages and that the plaintiff would suffer irreparable damage if the winding-up petition was allowed to be presented. The defendant, however, argued that since only the statutory notice of demand had been issued and not the petition, that application was premature. It disclosed no cause of action and did not contain a concise statement of the relied claim nor sufficient particulars of the cause of action as required under O. 7 r. 3(1) of the Rules of the High Court 1980. Therefore it was tantamount to preventing the defendant from exercising her legal rights.

Held:

[1] The tests to be applied in considering an application for an injunction restraining the presentation of a winding-up petition are are laid down by the Court of Appeal in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors*, ie, whether there are *bona fide* serious issues to be tried, where the justice of the case lies and whether the *status quo* ought to be maintained.

[2] In this case, there was a *bona fide* dispute as to the alleged debt. Furthermore, the statutory notice of demand was an abuse of process. The defendant ought to have filed a writ and statement of claim to determine the issues of liability.

[3] The justice of the case lay in granting the injunction as the debt was clearly in dispute. To wind-up the plaintiff would cause tremendous hardship and the balance of convenience favoured the grant of the injunction.

[4] The *status quo* ought to be maintained as the plaintiff had acted expeditiously and without delay.

[5] Public policy would also dictate the grant of the injunction as the plaintiff, being a stockbroking firm, must be liquid in order to trade. The implication of a winding-up petition would be serious and would have an immediate effect on the company's ability to deal with its assets.

[6] It was incorrect to say that the originating summons did not contain sufficient particulars under O. 7 r. 3(1) as the reliefs pleaded did contain sufficient concise statements as to merit consideration.

[7] As the application was an anticipatory step by an overtly cautious plaintiff and rested on the exercise of the court's discretion, the plaintiff was ordered to meet its own costs.

[Application allowed.]

Cases referred to:

Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1989] 2 CLJ 967 ***(cit)***

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424 ***(dist)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 ***(foll)***

Mann v. Goldstein [1968] 2 All ER 769 ***(foll)***

Re Lympne Investments Ltd [1972] 2 All ER 385 ***(foll)***

Legislation referred to:
Companies Act 1965, s. 218
Evidence Act 1950, ss. 91, 92
Rules of the High Court 1980, O. 7 r. 3(1)

For the plaintiff - DP Naban (Abdul Rashid Ismail with him); M/s Lee Hishamuddin
For the first defendant - R Kanthiah; M/s Paul Ong & Assoc

Reported by Anne Khoo

JUDGMENT

RK Nathan JC:

The plaintiff's application is to obtain an injunction from this court to restrain the defendant from presenting a winding-up petition. The defendant was in the employment of the plaintiff, initially as a trainee dealer representative, then as a licensed dealer representative and later as a remisier of the plaintiff from 2 March 92 to 31 December 1994. Subsequently the defendant left the plaintiff's employment and joined another stockbroking company. In essence, the dispute between the plaintiff and the defendant is as regards, *inter alia*, the percentage of commission payable to the defendant and the commissions which were wrongly offset against the losses suffered by the defendant's clients. The defendant's statutory notice of demand under s. 218 of the Companies Act (the Act) was for a sum of RM299,539.54 less EPF deductions of RM29,953.95 together with contra losses wrongly offset on the sum of RM42,853.21 and the legal fees charged to the defendant in respect thereof amounting to RM1,910.15 making a total of RM314,348.95. The plaintiff replied through its solicitors disputing the said claim. By a further letter the plaintiff offered to provide security for the defendant's alleged claim provided the defendant agreed to first establish that there was a genuine debt owed by obtaining a judgment for the sum claimed. In the course of correspondence the defendant twice suspended the time under the notice by 7 days. The plaintiff then gave the defendant a deadline to confirm in writing that the defendant would not be filing a winding-up petition. The deadline having passed the plaintiff has now proceeded with this application.

The Plaintiff's Case

The plaintiff contends that it is not indebted to the defendant of the alleged debt or any part thereof. The plaintiff has averred through its executive director that it was agreed that the defendant would only be paid 0.15% commission once she became a licensed dealer and was not entitled to 0.2% as claimed by her. It was further contended that the plaintiff had agreed to pay the 0.2% commission only if the defendant succeeded in bringing in large volume of trade and since she had failed to do so, she was entitled to only 0.15%. It

was also explained to the defendant that upon the receipt of her dealer representative licence the commission payable to her would only be 0.15% similar to the rate payable to all senior dealers and that she had agreed to the same and that she had not protested either verbally or in writing when shown the statements of account to this effect. The plaintiff also contended that it was the practice of the plaintiff and the stockbroking industry to offset the commission due to the remisiers against the contra losses suffered by their clients, in other words no commissions are payable before the collection of any debts related to those trades against which the commissions are calculated.

Since there is a *bona fide* dispute in respect of the alleged debt claimed by the defendant it was urged upon me that the defendant ought to commence an action by way of a writ.

The plaintiff relied on *Re Lympne Investments Ltd.* [1972] 2 All ER 385 where Meggary J said at pp. 388, 389:

> ... A real dispute, turning to a substantial extent on disputed questions of fact which require *viva voce* evidence, and involving charges of fraud or near fraud, cannot properly be decided on petition. Nor is it right, or in accordance with the modern practice, to stand over the petition in order that the disputed issues may be resolved in other proceedings. That practice, I may say, seems to stem from *Re London & Paris Banking Corpn.* [1875] LR 19 Eq 444, 23 WR 643, 10 Digest (Repl) 854, 5628). The Companies Court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding-up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought out.

On this basis the plaintiff argued that the presentation of a winding-up petition is not the proper method of determining the defendant's alleged debt. On a balance of convenience it was argued that the injunction ought to be granted.

On whether damages would be an adequate remedy the plaintiff submitted that it would suffer irreparable damage if the winding-up petition was allowed to be presented. It was submitted that if a winding-up petition was presented there was a risk that the banks would recall the loans they had provided. In so far as the defendant was concerned the plaintiff contended that the defendant could be adequately compensated by damages.

The Case For The Defence

The defendant on the other hand contended in her affidavit that she was entitled to a nett commission of 0.2% on all deals brought into the company by her. She denied the plaintiff's contention that she was due 0.15% and contended that this was a unilateral variation on the part of the plaintiff from the agreed rate of 0.2%. She also submitted that in any event she had brought a large volume of trade into the company.

The defendant contended that since she had only issued the statutory notice of demand and not the petition this application was premature and therefore misconceived in law. It was further argued in submission that this application disclosed no cause of action. It was urged upon me that the plaintiff had not complied with O. 7 r. 3(1) of the Rules of the High Court 1980 (the RHC) in that this originating summons did not contain any statement of the questions on which the plaintiff sought determination or direction from this court nor was there any concise statement of the relief or remedy claimed and neither was there a statement with sufficient particulars to identify the cause of action in which it wished to claim the relief. In support of her contentions that the debt was indisputable she referred to exh. A1 to encl. 1 which was a letter signed by a director of the plaintiff and dated 10 February 1992 which reads as follows:

> 10th February, 1992
>
> Ms. Leow Li Lain
> No. 44, SS4/21
> 47301 Petaling Jaya
>
> Dear Madam,
>
> Re : **COMMISSION PAYABLE**
>
> Further to our conversation, we are pleased to confirm that any deals that are brought in by your goodself, you would be remunerated with a net commission of 0.2%.
>
> Yours faithfully,
> EN. J SECURITIES SDN. BHD.
> Sgd.
> ...
> EDDY LEONG KOK WAH
> DIRECTOR

On this basis she submitted that there was no question but that she was entitled to the 0.2% commission. I was urged to disregard the defendant's explanation that there was oral evidence to vary the contents of exh. A1 and I was asked to consider the inapplicability of the parol evidence rule and that the plaintiff should not be allowed to vary, add to or subtract from the existing letter of offer by virtue of ss. 91 and 92 of the Evidence Act 1950. In any event the defendant submitted that there was no agreement that the defendant would be paid a nett commission of 2% only if the defendant could bring a high volume of trade.

Since the letter of offer did not include the Stockbroking Industries Practice at all, I was urged not to take judicial notice of the same. As such it was submitted that the practice in the industry of off-setting the contra losses from the commission due to the remisiers, was not to be considered. To obtain a court order to restrain the defendant from pursuing her legal remedies such as the winding-up petition was tantamount to ousting the defendant from exercising her legal rights. I was referred to *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447. In that case the appellant had served a notice on the respondent company demanding payment of RM127,159 and notifying that action for the winding-up of the respondent company would be taken in the event that payment was not made within the stated time. Since no payment was made the appellant filed the said petition for winding-up. The respondent company then applied for an injunction to restrain the appellant from advertising the petition and this was granted by the court. The respondent company whilst disputing the appellant's claim had admitted that it owed the appellant a sum of RM60,580. In allowing the appeal, the then Supreme Court held that since the amount of the admitted and unpaid debt was substantial, therefore the appellant should not be prevented from pursuing its petition. Relying on *Chip Yew Brick Works* the defendant urged me to hold that she ought not to be prevented from pursuing the petition as the court should be given the opportunity to consider all the evidence and then exercise its discretion whether to order the winding-up.

Having considered all the authorities submitted by both parties and having analysed the written submissions of counsel it is my view that the test to be applied in considering an application for an injunction restraining the presentation of a winding-up petition is the test as laid down by the Court of Appeal in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193.

On the first issue as to whether there is a *bona fide* serious issue to be tried it is clear that there is. The defendant relies on exh. A1 which on the face of it seems to suggest that the plaintiff had agreed to a commission of 0.2%.

The further submission of the defendant that parol evidence cannot be admissible pursuant to ss. 91 and 92 of the Evidence Act 1950 is too tempting to reject. But I cannot disregard the defendant's own averments that there have been numerous discussions regarding settlement. Further the plaintiff has produced statements of accounts where payments of 0.15% commission were made to the defendant without any protest from her in writing although she says she made verbal protests which have been denied by the plaintiff. In the light of this evidence can the defendant rely on ss. 91 and 92 of the Evidence Act. *Keet Gerald Francis* says that I must refrain from making any determination on the merits of the claim or any defence to it. Having considered the submissions of the parties I am of the view that there are serious questions to be tried. As to what form of proceedings these serious issues are to be tried, I hold that a winding-up petition is not the remedy available in this case. The defendant ought to file a writ and statement of claim to determine the issue of liability. I was also urged not to take judicial notice of the applicability of the Stockbroking Industries Practice since it was not included in the letter of offer. This submission lacks merit because if its applicability is mentioned in the letter of offer there is no need to take judicial notice of that fact.

In considering the submission that granting this injunction would be tantamount to precluding the defendant from exercising her legal right, I have to consider the second guideline laid down in *Keet Gerald Francis*. In taking into account the practical realities of the case I hold that the justice of the case lies in granting the injunction. Clearly the debt is in dispute. The only order a winding-up court could make is either to grant the order to wind-up or to dismiss the petition. To wind-up the plaintiff in this case would cause tremendous hardship and the balance of convenience favours the grant of this injunction. The defendant can be adequately compensated by suing the plaintiff to recover her debt. The harm that would befall the defendant if the injunction is granted would be far less than the harm that would result from its refusal. Although there was no undertaking as to damages, the defendant never raised this as an issue. Notwithstanding the same to my mind the injustice to the plaintiff in this case is so manifest that I did not deem it necessary to invite counsel for the plaintiff to give an undertaking as to damages (see *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). The *Chip Yew Brick Works* case has no relevance to the instant case. Here the sum claimed is in dispute, whereas in the *Chip Yew Brick Works* case a large portion of it was an admitted debt and the court granted the winding-up order in respect of the admitted debt.

On the third issue raised in *Keet Gerald Francis* I am of the view that the *status quo* ought to be maintained and that it can best be achieved by a grant of this injunction. The plaintiff acted with alacrity. As soon as the statutory notice was received the plaintiff requested for and obtained two suspensions of the time under the notice for 7 days. The plaintiff then gave the defendant a deadline to confirm that she would undertake not to file the winding-up petition. Immediately upon the expiry of the said deadline the plaintiff filed this application. There has therefore been no delay on the part of the plaintiff.

I would also go so far as to say that considerations of public policy would dictate the grant of an injunction in this case. The plaintiff being a stockbroking firm must be liquid in order to trade. The presentation of a winding-up petition would no doubt affect the plaintiff's ability to obtain loans from financial institutions. The presentation of a winding-up petition which has to be advertised in the newspapers would have a devastating effect upon the stockbroking firm. The implication of a winding-up petition is grave in that it has an immediate effect on the ability of a company to deal with its assets.

I hold that there is a *bona fide* dispute as to the alleged debt the defendant is claiming. The defendant ought to file a writ to commence an action. The statutory notice of demand is, in my view, in this case, an abuse of process. That I have a right to grant such an injunction, I need to go no further than to refer to *Mann v. Goldstein* [1968] 2 All ER 769 where Ungoed-Thomas J said at p. 775:

> For my part, I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding-up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds) since, until a creditor is established as a creditor he is not entitled to present the petition and has no *locus standi* in the companies court; and that, therefore, to invoke the winding-up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court.

There is one final issue that I have to consider and that is as to whether the plaintiff had not complied with O. 7 r. 3(1) of the RHC which reads as follows:

> 3(1) Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

To see if there are merits in the argument I reproduce the entire relief or remedy claimed by the plaintiff:

(a) that Leow Li Lain (NRIC No.A0708282), the Defendant abovenamed be restrained, whether by herself, or by her servants or agents or otherwise howsoever, from presenting to this Honourable Court or any other court and/or prosecuting any petition for the winding-up of the abovenamed Pengkalen Securities Sdn. Bhd. based on the sum of RM314,348.95, claimed in the statutory demand dated the 13th day of February, 1996 or any part thereof until after having obtained final judgment in her favour;

(b) alternatively, an Order that any petition presented for the winding-up of Pengkalen Securities Sdn. Bhd. based on the sum of RM314,348.95 claimed in the statutory demand dated the 13th day of February, 1996 or any part thereof, be struck out;

(c) such other order or relief as this Honourable Court may deem fit; and

(d) that the costs of this application be paid by the Defendant to the Plaintiffs.

It is totally incorrect to say that the above reliefs claimed do not contain any statement of the questions on which the plaintiff seeks determination or direction from the court. The reliefs pleaded contain sufficient concise statements as to merit consideration. This submission of the defence is also devoid of merit.

Having considered the totality of the submissions and having read all the authorities submitted to me, I granted the plaintiff order in terms of prayer (a) only.

Since this application rests on the exercise of my discretion, I was of the view that I would not award the plaintiff the costs of this application. The plaintiff is seeking an anticipatory step. It wants to be overtly cautious. That, it is entitled to do. But the justice of the case also warrants that it meets its own costs.